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IN THE SUPREME COURT OF THE UNITED STATES

Term, 1925

JOSE ALEJANDRINO,
Petitioner,

versus

MANUEL L. QUEZON, et al.,
Respondents.

R. G. No. 22041
Supreme Court of the Philippine Islands

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS, AND BRIEF IN SUPPORT THEREOF.

ARANETA & ZARAGOZA and
CLARO M. RECTO,
Attorneys for Petitioner.

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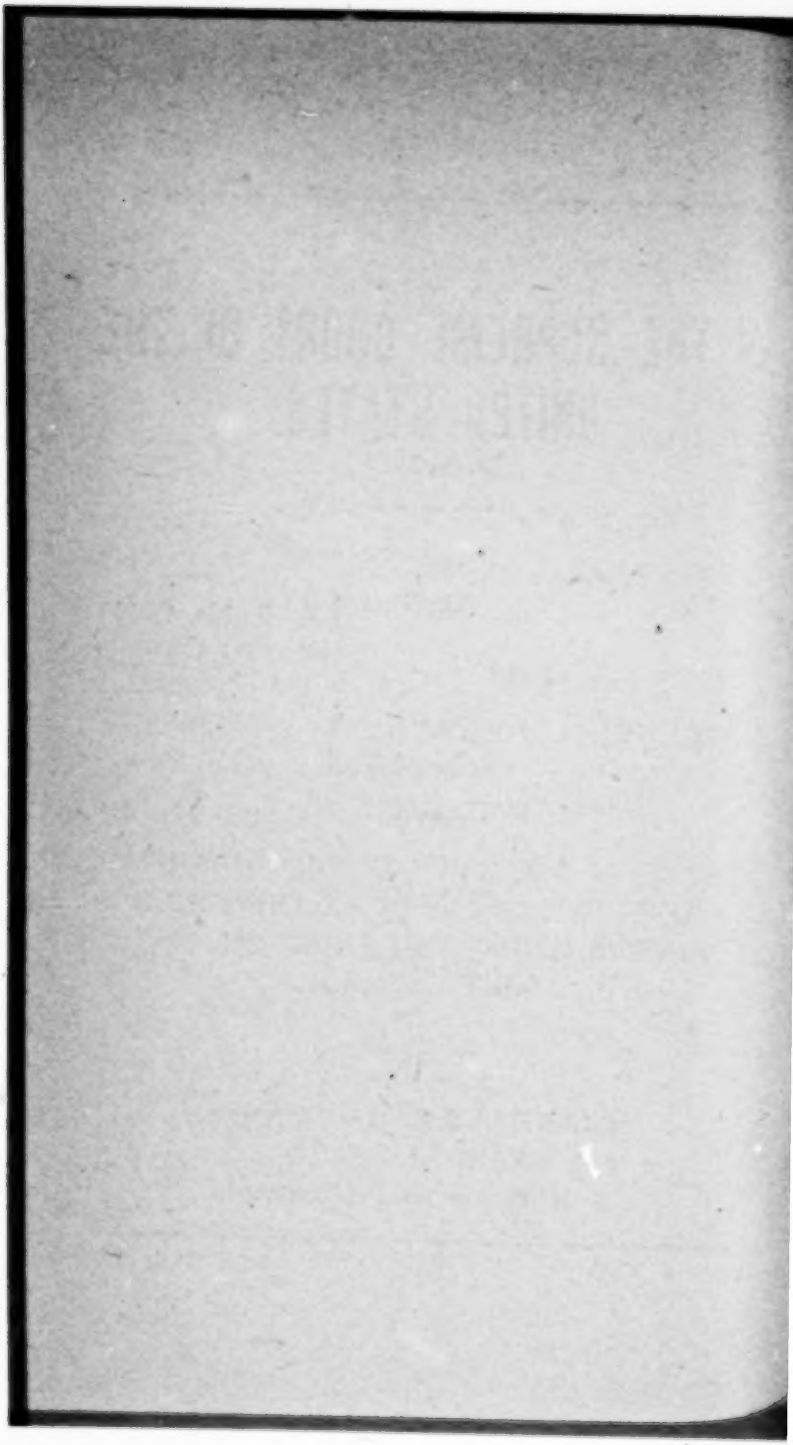

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R. G. No. 22041
Supreme Court of the Philippine Islands

PETITION FOR CERTIORARI TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS

To the Honorable the Supreme Court of the United States:

The above named petitioner Jose Alejandrino prays for a writ of certiorari to review a judgment of the Supreme Court of the Philippine Islands in a case entitled Jose Alejandrino, petitioner, *vs.* Manuel L. Quezon et al., respondents.

STATEMENT OF THE CASE

The petitioner in this proceeding in mandamus and in injunction is Jose Alejandrino, a Senator appointed by the Governor-General to represent the Twelfth Senatorial District. The respondents are all members of the Philippine Senate; with the exception of Faustino Aguilar, who is the Secretary of the Philippine Senate; Bernabe Bustamante, who is the Sergeant-at-Arms of the Philippine Senate, and Francisco Dayao, Paymaster of the Philippine Senate.

The *casus belli* is a resolution adopted by the Philippine Senate composed of the respondent Senators, on February 5, 1924, depriving Senator Alejandrino of all the prerogatives, privileges, and emoluments of his office for the period of one year from the first of January, 1924. The resolution reads as follows:

"RESOLVED: That the Honorable Jose Alejandrino, Senator for the Twelfth District, be, as he is hereby, declared guilty of disorderly conduct and flagrant violation of the privileges of the Senate for having treacherously assaulted the Honorable Vicente de Vera, Senator for the Sixth District, on the occasion of certain phrases being uttered by the

latter in the course of the debate regarding the credentials of said Mr. Alejandrino;

"RESOLVED, FURTHER: That the Honorable Jose Alejandrino be, as he is hereby, deprived of all of his prerogatives, privileges and emoluments as such Senator during one year from the first of January, nineteen hundred and twenty-four;

"AND RESOLVED, LASTLY: That the said Honorable Jose Alejandrino being a Senator appointed by the Governor-General of these Islands, a copy of this resolution be furnished said Governor-General for his information."

The burden of petitioner's complaint is that the resolution above quoted is unconstitutional and entirely of no effect. He prays the court: (1) to declare the aforesaid resolution of the Senate null and void; and (2) as a consequence of the foregoing, to issue a final writ of mandamus and injunction against the respondents ordering them to recognize the rights of the petitioner to exercise his office as Senator and that he enjoy all of his prerogatives, privileges, and emoluments, and prohibiting them from preventing the petitioner from exercising the rights of his office, and from carrying the order of suspension into effect.

By special appearance, the Attorney-General, in representation of the respondents, objected to the jurisdiction of the Court (Transcript of Record, p. 10). After a thorough discussion of the question by both parties who presented their arguments orally and in writing, the Insular Supreme Court declared itself with jurisdiction and ordered the respondents to demur or answer within five days from notice thereof (T. of R., p. 11.) Thereupon the Attorney-General filed his demurrer, pressing the same point of lack of jurisdiction of the judiciary on the subject-matter of the petition, and also taking the ground that the petition does not state facts sufficient to constitute a cause of action.

On passing upon the demurrer the Insular Supreme Court issued the following resolution:

> "After a careful consideration of the petition, the demurrer and the arguments pro and con by the respective parties, a majority of the Court is of the opinion: (a) that it has jurisdiction to consider the questions presented, and (b) that the facts stated in the petition are not sufficient to constitute a cause of action; and it is therefore hereby ordered that the petitioner be permitted, if he so desires, to file an amended petition within twenty-four hours from notice hereof, and that the respondents be required to demur or answer the petition, when amended, with-

in twenty-four hours after the receipt of a copy of the amended petition. It is so ordered.

"Chief Justice Araullo dissents from the opinion of the majority of the Court, for the reason that this Court is without jurisdiction over the subject-matter of the action and to consider the questions presented by the petitioner and having no jurisdiction this Court cannot grant the petitioner the right to amend his pleading on the ground that the facts stated in the petition are not sufficient to constitute a cause of action. And consequently, this petition should be dismissed." (T. of R., p. 21).

To which resolution both parties filed their respective exceptions.

The petition was amended, and by said amendment it was pointed out:

"That the aggresion committed by plaintiff in the person of Senator Vicente Vera did not occur in the hall where the Senate holds its sessions, that it occurred after the Senate had adjourned its session the night of the event, that it did not cause any disorder, disturbance, or impediment in any of the acts or functions of the Senate, and that such resolution of suspension did not, nor could have, for its end, to restore the order not disturbed by the act committed by plaintiff; * * * that the aggression committed by the plaintiff consisted of a buffet given to the lips of Senator Vera and did not produce any injury; and that taking into account the act itself and the

circumstances surrounding it, the penalty imposed on the plaintiff is cruel and unusual." (T. of R., p. 29.)

Nearly five months after the amendment was submitted to the Insular Supreme Court, this High Tribunal rendered a decision, whereby six out of the seven members of the Court who knew of the case declared that the resolution adopted by the Senate, of date February 5, 1924, suspending the petitioner Jose Alejandrino, a Senator for the twelfth senatorial district *appointed* by the Governor-General of the Islands, for a period of one year, from January 1, 1924, is unconstitutional, null and void, on the ground that such a suspension amounted to an expulsion, and that the Senate, under the Organic Act of the Philippine Islands, has no authority to expel an appointive senator, and on the further ground that the Constitution has purposely withheld from the two Houses of the Legislature the power to suspend a member of the Legislature, a power not included neither in the power to punish nor in the power to expel.

One member of the Court abstained from expressing his view on that point, thinking it unnecessary and improper in view of the opinion of the

majority of the Court, to which he concurred, that the Court had no jurisdiction on the subject-matter of the case. On the question of the lack of jurisdiction of the Court, two very forceful dissenting opinions were filed by Justices Johnson and Ostrand.

It seems proper to point out that the new facts as brought up by the amendment of the complaint, are not responsible in any way for the change in the opinion of the members of the Court. Independently of the circumstances of the aggression and as to whether the punishment was cruel and unusual, the members of the Supreme Court declared the resolution of the Senate suspending Senator Alejandrino, unconstitutional, for entire lack of power of the Senate to suspend an appointive Senator under whatsoever circumstances.

It should also be pointed out that even though the suspension of Senator Alejandrino from all prerogatives and privileges expires on December 31, 1924, so that this Honorable Supreme Court of the United States may not be able to grant in time the relief sought that the petitioner be reinstated in all his prerogatives and privileges as a Senator, still it is respectfully submitted that this Honorable Supreme

Court should grant the writ of certiorari, declaring that the resolution in question is unconstitutional and that the Judiciary has jursidiction over the case,—and grant the relief sought as to the emoluments that the illegally suspended senator has a right to recover.

QUESTIONS PRESENTED

Two are the main important questions presented:

First. Is the resolution in question within the powers of the Senate?

Second. Has the Supreme Court jurisdiction to pass upon the constitutionality or unconstitutionality of a resolution of the Senate and the power to grant the remedy prayed for?

REASONS FOR THE ALLOWANCE OF THE WRIT

I.

That according to Section 27 of the Act of Congress approved August 29, 1916, in connection with Section 5 of the Act of Congress approved September 6, 1916, this court has jurisdiction by certiorari or otherwise, to require that there be certified to it for review and determination any cause decided by

the Supreme Court of the Philippine Islands in which the Constitution or any *statute* * * * of the United States is involved."

II.

That the resolution in question of the Senate of the Philippine Islands, suspending for one year a senator appointed by the Governor-General is unconstitutional in violation of our Organic Law, Act of Congress of August 29, 1916, and therefore a void act of the Senate, an act wholly outside of its province, and which deprives a citizen of rights and privileges to which he by law is entitled, and which furthermore encroaches into the rights and powers of the Governor-General, and into the right of representation of the people of the Senatorial District whose representation in the Senate Senator Alejandrino holds.

III.

That the decision of the Insular Supreme Court declaring itself without jurisdiction upon the subject-matter is in violation of the Organic Act of the Philippine Islands, Act of Congress of August 29, 1916, section 26, which defines the powers and jurisdiction of the Judiciary, and contrary to the well-

settled doctrine of the United States Supreme Court and of the Supreme Court of the Philippine Islands as well, that the will of the people, as embodied in the Constitution (in our case the will of the Congress of the United States as embodied in our Organic law) is paramount to the will of any of the departments of the Government, and that the judiciary which has the Constitutional duty to declare, interpret and uphold the Supreme Law of the land, has the power commensurate to said duty, even as against a coordinate branch of the Government, when the same is acting outside the limits set out by the constitution in violation of rights guaranteed by the Constitution.

Wherefore, your petitioner respectfully prays for a writ of certiorari to the Supreme Court of the Philippine Islands in the case therein entitled Jose Alejandrino, petitioner, *vs.* Manuel L. Quezon et al., respondents, to the end that the same may be reviewed and determined by this court, and that the said judgment of the Supreme Court of the Philippine Islands in the said case may be reversed by this Honorable Court.

CLARO M. RECTO
Attorney for Petitioner.

United States of America)
Philippine Islands } s. s.
City of Manila)

Gregorio Araneta, being duly sworn, says that he was one of the attorneys and counsel in the Supreme Court of the Philippine Islands for the petitioner herein, that he has read the foregoing petition, and that the facts therein stated are true to the best of his information and belief.

(Sgd.) GREGORIO ARANETA

Subscribed and sworn to before me this 2nd day of January, 1925. Affiant exhibited Cedula No. F-30 issued at Manila, on January 3rd, 1924.

SALVADOR ARANETA
Notary Public.

My commission expires
December 31, 1924.

(SEAL)

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Book I

BRIEF IN SUPPORT OF PETITION

I

LEGALITY OF THE RESOLUTION

The Senate of the Philippine Islands exercises delegated powers, all of which are derived from the Organic Act. That Act provides for twenty-two senators to be elected by the people and for two other senators to be appointed by the Governor-General. (Sec. 16.) In the language of the Act the appointive Senators shall be appointed by the Governor-General "without the consent of the Senate" (sec. 16) and "shall hold office until removed by the Governor-General." (Sec. 17.) The Act further provides that "each house may determine the rules of its proceedings, *punish* its members for disorderly behavior, and with concurrence of two-thirds, expel an *elective* member." (Sec. 18.) From these provisions, two obvious conclusions can be drawn:

1. That the Senate has not the power to expel an appointive member of its body.

2. But that it has the power to punish any member for disorderly behavior.

The power to suspend is not within the power to punish nor within the power

to expel. Hence the Senate has not the power to suspend not even an elective member.

On this point the Insular Supreme Court in its decision has said:

"It is noteworthy that the Congress of the United States has not in all its long history suspended a member. And the reason is obvious. Punishment by way of reprimand or fine vindicates the outraged dignity of the House without depriving the constituency of representation; expulsion, when permissible, likewise vindicates the honor of the legislative body while giving to the constituency an opportunity to elect anew; but suspension deprives the electoral district of representation without that district being afforded any means by which to fill the vacancy. By suspension, the seat remains filled but the occupant is silenced. Suspension for one year is equivalent to qualified expulsion or removal." (T. of R., p. 41.)

And Justice Johnson in his opinion reasons in a very forceful language, thus: "The said resolution not only *deprives* the petitioner of all his 'prerogatives, privileges and emoluments for the period of one year, but also *deprives the people of his dis-*

trict, composed of about one million persons, of any representation or participation in the legislative affairs of the government for a period of one year,—a right which is guaranteed to them under the constitution. Such a result was certainly not contemplated by the provisions of the Jones Law." (T. of R., p. 45.)

"The power to punish for misbehavior was intended purely as a disciplinary measure. When a member of the Legislature is removed either by the Governor-General or by the Legislature, a vacancy exists, and the law gives the Governor-General the right to appoint, and the people of the district the right to fill the vacancy by election, so that the people may again, under either case, be represented. A 'suspension' of a member, however, does not create a vacancy, and the people of the district are without a representative and the Governor-General can not appoint one and the people cannot elect one during the period of suspension. They are without representation during that period. They are, for the period of suspension, taxed without representation. If a member, under the power to punish, can be suspended for one year, for the same reason he may be suspended for ten or more years, thus depriving the

Governor-General of his right under the law, and the people of the district, of a representative, and without a remedy in the premises." (T. of R., pp. 45, 46.)

Our Constitution provides:

> "• • • Each of the Senatorial Districts defined as hereinafter provided shall have *the right to elect* two senators • • •" (Sec. 13.)
>
> "• • • Each of the Representative Districts hereinafter provided for shall have the right to elect one Representative • • •" (Sec. 14.)

This right to elect should receive a reasonable interpretation. It means more than the mere act of electing or voting. It covers the right of constantly having—as far as it can be reasonably possible—a member who represents the District in the House.

Our form of government is entirely democratic in nature. Ours, as that of the United States, is a government of the people. One of the purposes of our Organic Act is "to place in the hands of the people of the Philippines as large a control of their domestic affairs as can be given them. • • •" As we have seen it is *the right of this people*, grouped into Districts, to elect their representatives in the Legislature. This right to elect means a right to constantly be represented by a member in the Legisla-

ture. How should we, then, deprive the people of this *express* fundamental and constitutional right, by favoring mere *implied* power of suspension? Under no rule of statutory construction it would be warranted to overthrow an *express right*, specially when it is so fundamental as the one in question, by mere *implied* and *dubious* power of suspension said to be within the power to punish or to expel.

It should be noted that the electing and the removing powers, of the members of the Senate, are not in the same hands. They are elected by the people, while they may be expelled by the Senate.

Though generally the power to expel or remove covers the power to suspend, it does not, when the authority to remove and the authority to appoint or elect are not in the same hands. If not so, the removing power could with the suspension, during which time the seat does not become vacant, deprive the appointive power of his right of exercising this prerogative. This doctrine is now well settled and it seems that it was first laid down in the early case of State *v.* Jersey City (1 Dutcher 536) 25 N. J. L., 536, where the question presented was whether a common council which by law was expressly empowered to expel a member of its body, had the im-

plied power to suspend a member. The Court in answering negatively said:

> "* * * This proceeding amounts to a suspension of the relator from the exercise of his official duties, as a member of that body. *It leaves his constituents unrepresented and without remedy.* Expulsion creates a vacancy that can be supplied by a new election. Suspension from the duties of the office creates no vacancy; the seat is filled, but the occupant is silenced. The charter vests no such power in the council; it would be extraordinary if it did. The power is to expel not to suspend."

This doctrine was followed in the case of Gregory *v.* New York, 113 N. Y., 416, where the Court said:

> "* * * There is nothing in the nature of the power to remove or expel which necessarily and in all cases would include a power to suspend, for in some instances, of which the above case would be a good example, the power to suspend would seem to be very different in its nature from the power to remove, and not necessarily a minor power included in the power of expulsion. *The rights of a constituency might be affected most deeply by the exercise of the power to suspend,* and yet would be in truth untouched by the expulsion of an unworthy representative. * * *"

See also case of Morley *v.* New York, 35 N. Y. S. R., 263, following the doctrine of Gregory v. New York.

It is obvious that, if the power to suspend can not be considered impliedly within the power to expel, the power to punish (which is of minor importance since among other reasons punishment requires but a majority vote while expulsion has to be voted by two-thirds of the members) does not carry with it the power to suspend.

The force of this argumentation cannot be denied. In the New Jersey Case, the Court came to say: "The power to suspend would mean to deprive the constituency of the member suspended of their representation for certain period. Consequently we cannot favor any construction of the law which by a mere inference would deprive a portion of the people of their right to a seat in an elective body."

However, it should be admitted that there are authorities *contra*, which hold that within the power to punish is included the power to suspend.

First we have the *dictum* of this Honorable Su-

preme Court in the case of Kilbourn *v.* Thompson (103 U. S., 189), Justice Miller saying:

> "We have no reason to doubt that the punishment may in a proper case be *imprisonment*, and that it may be for refusal to obey some rule on that subject made by the House for the preservation of order."

And Cushing in his Law and Practice of Legislative Assemblies says:

> "Members may also be suspended by way of punishment, from their functions as such, either in whole or in part or for a limited time. This is a sentence of a milder character than expulsion." (Sec. 280.)
>
> "During the suspension the electors are deprived of the services of their representative without power to supply this place, but the rights of the electors are no more infringed by this proceedings *than by the exercise of the power to imprison.*" (Sec. 627.)
>
> "The suspension of members from the service of the House is another form of punishment." (May, Parliamentary Practice, 53.)

It is noteworthy that in the long history of the Congress of the United States no case has been found after a thorough examination of all the cases given in Hinds' Precedents, where a House of Congress has punished with imprisonment or with suspen-

sion. The only thing near to suspension which we have found is to declare a member in contempt, which according to a Report of the Committee on Privileges and Elections in the case of Senators McLaurin and Fillman (1902) (Hind's Precedents, sec. 1665) carries with it a suspension of his function as such member of the legislative body during the time such member is in contempt. In that case the disorderly behaviour occurred while the Senate was in session and the two guilty Senators were immediately declared in contempt of the Senate. Subsequently, as the Senate continued its session, the question was raised whether the members declared in contempt of the Senate were deprived of their power to vote. The question was not decided until the Committee on Privileges and Elections recommended censure as final action, after giving the above opinion, as to the legal effect of being declared in contempt of the Senate. A portion of the majority, three members in all, submitted views in favor of suspension of the two Senators and discussed the power of the Senate to punish with suspension. A minority of the committee, five members in all, dissented "from so much of the report of the committee as asserts the power

of the Senate to suspend a Senator and thus deprive a State of its vote."

As we see, on this point, as to whether the power to punish carries with it the power of suspension, we have on one side for the affirmative, a mere *dictum* of this Honorable Supreme Court, that the power to punish carries with it the power to imprison, and with this *dictum* as a back-ground, two authors and a portion of the majority of the members of a committee of the Senate in the case above referred to have contended, that if the Senate has the power to punish with imprisonment as declared in that *dictum* of the Supreme Court, it also has the power to punish with suspension, they arguing that "the electors are deprived of the services of their representative without power to supply their place, but the rights of the electors are no more infringed by this proceeding than by an exercise of the power to imprison." Those are at most secondary authorities and they all depend on the truth of the proposition which we have not yet seen discussed, that the Senate or the House of Representatives has power to imprison one of its members as a punishment for disorderly behaviour.

Against these authorities, we have *judicial* authorities which go for the proposition that the power of suspension, inasmuch as it involves such a fundamental power as to deprive a group of electors of their representative, is not to be considered as included by mere implication in a more general power which does not carry with it the fundamental power of depriving a group of electors of their representation.

But it should be pointed out that the above quoted expression of this Honorable Supreme Court which has found its way in the case of Kilbourn *vs.* Thompson only amounts to a *dictum*, as it was not necessary for the resolution of the question involved in the case. And we should notice, that the words of the Court "that this punishment *may in a proper case* be imprisonment, and that it may *be for refusal* to obey some rule on that subject made by the House for the *preservation of order*" only make reference to the punishment of imprisonment as a preventive or protective measure to preserve order, and not as a punitive measure to vindicate the order that has been disturbed. We feel that if this Honorable Supreme Court had in mind the punishment not as protective measure but as a punitive one, it would not have

made such a declaration. It would have paused to consider that an imprisonment, without any qualification and imposed during the time of the sessions of the House, would deprive the member suspended of his prerogatives as a member of the House, to assist in its deliberations and vote in all its proceedings, thus depriving the electorate of their representation in the House. The declaration at most would have been made with the important qualification that the imprisonment should be so executed as not to deprive the member of his right to assist and vote in the deliberations of the House.

There are two classes of suspensions in the law of officers. Suspension made use of as a preventive or protective power pending investigation of charges, and *suspension* made use of as a punitive power, to vindicate the moral order that has been disturbed by the act, object of the punishment. We are not dealing here with the first class of suspensions which might be considered as incidental to the power of each House, to perform the duties and exercise the powers which the Constitution has conferred on them, as was the case already referred to, where a declaration in contempt of the Senate for disorderly behavior in open session of the Senate carried with it temporary suspension during the

term he was declared to be in contempt. (Hinds' Precedents, sec. 1665.) We are dealing exclusively with the suspension as a punitive measure, which is the suspension of the case at bar. If a majority of the Senate has the power to suspend for one year, it has the power to suspend for two or three years, thus covering the whole period of a Legislature, and hence we ask, if this is not virtually to expel the member, an act which by the Constitution has to be approved by the two-thirds of the members of the house. The power of punishment cannot cover anything of the nature of an expulsion or anything which would amount to an expulsion. Suspension, because it is a deprivation of the rights of a member as such member, is of the nature of a temporary expulsion and the longer the suspension the more it virtually amounts to an expulsion.

Finally we quote from the opinion of Justice Johnson the following excerpts: "In the case of Commonwealth *vs.* Barry it was decided that to punish an officer for 'disorderly behavior' such misbehavior must be such as affects the performance of his duties or the legal or ordinary procedure of the body of which he is a member, and not disorderly behavior which affects his character as a private individual.

"In this connection it may be noted that the alleged 'misbehavior' on the part of the petitioner was committed outside of the legislative halls and at a time when there was no session of the Senate; that said alleged 'misbehavior' did not take place in or near the Senate chamber, nor caused any disorder, disturbance, annoyance, or impediment whatever to the orderly and dignified procedure of any session of the Senate; that said 'misbehavior' did not interfere in any manner whatever with the honor, dignity, and efficiency, nor with the orderly proceedings of the Senate; that the petitioner did not know, at the time of the alleged 'misbehavior', that he had been admitted as a member of the Philippine Senate. The question of his admission as a senator had been under discussion for weeks theretofore." (T. of R., pp. 48 and 49.)

"The power to punish for disorderly behavior has never been exercised further than to impose a mere reprimand. We regard the fact that the Congress of the United States has never exercised its power, to *punish* for disorderly behavior, by depriving a member of all his rights, prerogatives, privileges, and emoluments, as strong proof that it did not believe that its power to *punish* justified an order or resolution depriving a member of all of his rights, prerogatives, privileges, and emoluments.

Many cases might be cited showing misbehavior of much more serious character than that charged against the petitioner and where a reprimand only was imposed." (T. of R., pp. 49-50.)

Our conclusion is that the Senate neither in the exercise of its power to punish nor in the exercise of its power to remove has the power to suspend an elective Senator, and that good reasons sustain these propositions.

Admitting that the power to suspend is within the power to punish or within the power to expel, and that consequently the Senate has the power to suspend an elective member, it is submitted that it has not the power to suspend an appointive member.

Our Organic law provides:

> "Senators and Representatives appointed by the Governor-General *shall hold office* until removed by the Governor-General." (Sec. 17.)

For the purpose of our argumentation, we shall even admit that the Senate or the House of Representatives has the power to suspend an *elective* mem-

ber under the power to punish or the power to expel. If so, it would follow that under the power to punish it has the power to suspend an *appointive* member unless section 17, providing that appointive members *shall hold office* until removed by the Governor-General, should prevail over section 18, giving the House a general power to punish all members. *Which section should prevail?*

If appointive members *shall hold office* until removed by the Governor-General, would they be holding office while suspended or temporarily deprived from office by the Senate, and deprived of their right to attend its sessions, to have a voice, to vote, and to receive a salary? Certainly not. It should be remembered that this is not a case of suspension made use of as a preventive or protective measure pending investigation of charges. It is a case of a suspension made use of as a *punitive measure.* The exercise of such punitive power of suspension over an appointive member of the Senate would be to curtail, to say the least, the power of the Governor to have the appointive Senator hold office until removed by him.

> "Suspension from office is a deprivation of the office for the time being." (Am. & Eng. Enc. of Law, page 557.)

"In Kelly *vs.* Cincinnati, 9 Ohio Dec., 612 it was held that a suspension from office for an indefinite time, and lasting for a period of six months, lost its temporary character, ceased to be a suspension, and became a removal.

"In the case of State *vs.* Chamber of Commerce, 20 Wis., 63, it was held that the suspension of a member was a qualified expulsion, and, that whether it was called suspension or expulsion it disfranchised him either temporarily or permanently."

And as pointed out by Justice Johnson: "The resolution does not use the word 'suspend' but does use the word 'deprive.' It provides that the petitioner is 'deprived' of all his prerogatives, etc., for a period of one year * * * If a value can be placed upon his prerogatives, privileges, and emoluments, and if he has been deprived of them, then it must follow that they have been removed from him, or that he has been removed from them. At any rate, the resolution has separated the petitioner and the people whom he represents and deprived them of all of their prerogatives, privileges, and emoluments for the period of one year; and, for all intents and purposes, he and the people whom he represents have been deprived of their prerogatives, privileges, and emoluments, and in effect, have removed from any participation in the legislative affairs of the government." (T. of R., p. 47.)

The appointive Senator that has been suspended might be granted to be a Senator in name, but he is not a Senator in fact, having been temporarily deprived of his powers as such Senator. And the right of the Governor-General of having his appointive Senator holding office till removed by him, is a real right, not an illusory one. If we admit that the Senate can suspend an appointive member, the suspension may be not only for one year but for ten or more years in which case, though the intrusion of the Senate is more striking, the legal aspect of the situation remains unchanged. "Questions of power," says Marshall, *Ch. J.*, in Brown *vs.* Maryland 25 U. S., 12 Wheat., 419, 439 (6 L. ed. 678) "do not depend on the degree to which it may be exercised. If it may be exercised at all, it must be exercised at the will of those in whose hands it is placed." Hence, if we say that the Senate has the power to suspend for one day, it would also have the power to suspend for one year or ten years which is clearly making wholly illusory the right of the Governor-General to have the appointive Senator hold office until removed by him. And conversely if the Senate cannot suspend an appointive member for ten years it cannot suspend for one year. This view is confirmed by decisions holding that an authority hav-

ing no power to remove has no power to suspend. Melaker *vs.* Malley, 41 Kan., 122; State *vs.* Chamber of Commerce, 20 Wis., 63.

In the present case where Senator Alejandrino has been deprived of his prerogatives, privileges and emoluments as such Senator for the period of one year, can it be said that during that time he is holding his office? The answer is evidently in the negative, and proves that with that suspension, the provision of section 17, prescribing that appointive members shall hold office until removed by the Governor-General has been violated with the suspension for one year of Senator Alejandrino.

Section 18 giving power to punish, is a general provision covering elective as well as appointive members. Section 17 making it the right of the Governor-General to have the appointive member hold office until removed by him, is a less general provision as it applies only to appointive members. Granting that the two sections are not entirely in accord as to the power of the Senate to suspend an appointive Senator, section 17 should prevail, being the less general provision.

Finally, as pointed out by Justice Ostrand: "It will be observed that no power to expel or remove appointive members is conferred on the houses of

the Legislature, nor can such power be inferred or implied from the statute, in view of the fact that it is expressly placed in the hands of the Governor-General. The Act does not limit or qualify the term 'remove' and it therefore includes both temporary and permanent removals.

"An examination of the Senate resolution in question shows that in effect it provides for a complete temporary removal of the petitioner. It does not merely exclude him from the floor of the Senate Chamber, but he is also 'deprived of *all* his prerogatives, privileges, and emoluments as such senator,' for the period of one year. As far as he is concerned, his removal from office for that period could not be made more complete. In attempting to exercise the power of such removal, the Senate clearly arrogated to itself powers which it does not possess and which, under the Organic Act, rest in the Chief Executive." (T. of R., pp. 90, 91.)

II

JURISDICTION TO CONSIDER THE QUESTION

It is admitted in the decision of the majority of the Insular Supreme Court that respondents acted wholly outside the scope of their powers when they

suspended Senator Alejandrino for one year. It cannot be denied that in so acting, they encroached into the powers and privileges of the Governor-General, who, under our Organic Act, has the right to have all appointive Senators hold office until removed by him; that in so acting they disregarded the right of representation of the people of the senatorial district whose representation in the Senate, Senator Alejandrino holds; that in so acting they violated the right of the incumbent who, as a citizen and as a senator has the right not to be deprived of his office without due process of law, *i. e.*, the right to be deprived only by a duly authorized authority.

Considering these premises, the question presented is,—Has our Organic Law provided for a check to acts of public officers, wholly outside the scope of their powers, as defined and limited by said Organic Act, and which, furthermore, constitute a violation and an encroachment into the rights and privileges of the Governor-General, into the rights of the electorate, and into the rights of a Senator and a citizen, all of which have their source from our very Organic Act?

The Constitution limits the powers of the three departments of government. And the all-fundamental question as to whether each department of

government shall be its own judge in the interpretation of the limitations set on its powers by the constitution, or whether it is an attribute of the judicial power to enforce the Constitution independently of the interpretation that the legislative and executive departments might have given to their respective powers under the constitution, has ceased to be an open question since the days of the famous Marshall's decision in Marbury *vs.* Madison (1 Cranch, U. S., 137 (1803). In the language of Professor McLaughlin of the Chicago University, the underlying theory of Marshall's decision is that:

> "If the Constitution was law, the Courts must place their interpretation on it and not recognize the rights of the legislative body to determine its own rights under it" (The Courts, the Constitution and Parties, pp. 9-10.)

Or, as another writer in the Harvard Law Review puts it:

> "The Constitution could be law in the English sense only if some court had power to interpret and enforce it; and, while the courts might not 'ignore,' still they must, if in their judgment erroneous, disregard a merely legislative interpretation of the Constitution. The meaning of the Constitution *as law* could be determined only by the judgment of some court, and Congress, under the Constitution, was not a

court." (Herbert Pope in an article entitled 'The fundamental law and the power of courts,' 27 Harvard Law Review, 45, 47.)[1]

Having these fundamental considerations in mind, we ask with Justice Johnson in his dissenting opinion:

> Shall it be said, in the face of the provisions of the Jones Law, and of the acknowledged right of the judicial department of the government to decide in proper cases, that statutes which have been passed by both branches of the Legislature and approved by the Governor-General are illegal and unconstitutional, and that said department cannot give a remedy when the citizen has been deprived of his life or property without lawful authority and without due compensation, simply because the executive or legislative department has ordered it? (Transcript of Record, p. 68.)

At the outset, it will be of aid for a thorough study of the merits of the issue and to be in position

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(1) Further on, the same writer, on the same point, has the following very illuminating considerations to offer as to the real basis and ground for Marshall's decision:

> "His conclusion was that the courts were bound by the Constitution, and, for him, that meant, as a matter of course, the assumption by the courts of the power to interpret the Constitution and enforce it as thus interpreted. If the courts were not thus bound to interpret and

of distinguishing the instant case from the decisions arrived at in similar cases, to determine the sources of judicial review. That is, the basis that the Judiciary has to review the omissions, actions or decisions of public officers.

An officer of the executive or legislative department may be invested by the Constitution or by an Act of the Legislature with certain functions and duties. The Constitution or Act of the Legislature creating such office may not expressly provide for any appeal to the Courts, from any omission, action, or decision of said officer in the exercise of his functions. In such a case, on what possible grounds would the courts step into the matter and review the omission, action, or decision of the said officer?

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enforce the Constitution, it must follow, either that the Constitution was not the expression of a fundamental law, or that the acts of Congress should be treated as the judgments of a superior court authorized to determine conclusively the meaning and effect of that law. That the Constitution did establish a fundamental law was Marshall's first proposition; that the courts were bound by it was his second proposition, and his conclusion, or assumption, was that this required the courts to hold void legislative acts which the courts found to be inconsistent with such law. He did not consider the possibility that the acts of Congress might be regarded as the judgments

Two are the possible sources: (a)—The express or implied intention of the people as embodied in the Constitution itself; (b)—And the express or implied intention of the Legislature, as embodied in the Act creating and defining the particular public office, to have the Judiciary exercise a certain reviewing power and for certain exceptional cases.

In our constitution we have in the first place (a)—the so-called Bill of Rights of the Constitu-

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of a court superior to the Supreme Court itself. Such a proposition must necessarily mean, not only that the courts provided for by the Constitution did not constitute an independent and coordinate branch of the Government, but that the courts were not in fact vested with all of the judicial power. It involved not only a denial of the independence of the judiciary but a denial of the separation of the legislative and judicial powers. It is not strange that Marshall did not stop to consider such a possibility. (Pp. 50, 51.)

"It was admitted, of course, that Congress, in acting, ought to consider and decide whether its acts were consistent with the Constitution. But it could not decide such questions as a court for the simple reason that, under the Constitution, it had no power to exercise judicial functions. That is the true significance of the separation of powers under the Constitution. The legislative and executive powers must of necessity interpret the Constitution, and, in the absence of a judicial decision, act upon their interpretation of it, but such interpretation did

tion, specially the "due process" clause, and (b)—all the provisions of our Organic Act, defining and limiting the powers of the executive officers and of the Legislative Department and in the present case, all the provisions of our Organic Act which imply the negation of the power of the Senate to suspend appointive senators.

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not and could not declare the Constitution as law. The courts also must interpret the Constitution, and they too must act on their interpretation of it, but such action by the courts meant the declaration and enforcement of their interpretation as law. That is what courts are for; their judgment is conclusive upon the parties before them, and upon other parties in like cases who come after them. The conclusive judicial determination of the fundamental law, as of all law, is vested in the highest court, and as the court decides so is the law enforced * * * In this country, where the legislative body is a legislature merely, and not a court, the legislature may have an opinion about the fundamental law, and may express it, but the law is not necessarily enforced according to such declaration of it. Our highest court, which is independent of the legislative power, has also the right and duty, in a proper case, to express an opinion upon the fundamental law, and as the law is expressed by the court so is it enforced. That is what makes it law indeed. The expression of the legislature remains an opinion; the expression of the court becomes the law." (Pp. 51, 52.)

As we have just seen it is an attribute of the judiciary to enforce the Constitution independently of the interpretation that the legislative and executive departments might have given to their respective powers under the constitution, and to the legality of their acts under the limitations set by the Bill of Rights. It means, in other words, that it was the *intention* of the people when the constitution was approved, that the Judiciary should step in, in all cases where an officer of the legislative or executive departments of the government has overstepped the limits of its own powers as defined by the constitution, or has transgressed the limitations in the Bill of Rights of the Constitution.

But at the same time that the constitution has fixed certain limitations upon the powers of the departments of the government, and has subjected to the limitations of the Bill of Rights the acts of any person whatsoever, including public officers; on the other hand, the constitution has granted the departments of the government sufficient discretion upon matters of their respective exclusive jurisdiction. In such cases mere errors of judgment and even instances of abuse of discretion would not justify the

Judiciary to interfere, provided always the limitations of the Constitution above referred to are not overstepped.

It is consequently provided in the constitution that "all legislative powers shall be vested in a Congress of the United States" and all "the executive power shall be vested in a President of the United States."[2] And because of these considerations, it is now well settled that the Judicial Power will not interfere with the acts of another department when such acts are purely political or non-justiciable[3] and that the judicial power will not by mandamus or other writs, attempt to control the exercise

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(2) Similar provisions are found in the Organic Act of the Philippine Islands: "That general legislative powers in the Philippines, except as herein otherwise provided, shall be vested in a legislature" (sec. 12). "That the Supreme executive power shall be vested in an executive officer, whose official title shall be the Governor-General of the Philippine Islands" (sec. 21).

(3) Luther *vs.* Borden, 7 Howard 1, is a case where it was held by this Supreme Court that it rested with the political power and not with the Judiciary to decide whether the Charter Government of a state has been displaced or not; The Prize Cases (2 Black) might also be given as an illustration of this set of cases. There it was held that it was a purely political question entirely committed to the President to decide whether or not there was a state of war.

by the other departments of the government of executive powers or duties conferred upon them by the constitution, or by a statute.

An illustration that courts will not interfere in the exercise by one department of its political and executive duties is the case of Mississippi *vs.* Johnson (4 Wall. 475), where this Supreme Court declined to issue the writ of injunction petitioned by the State of Mississippi against the President of the United States to restrain him from carrying into effect an act of Congress alleged to be unconstitutional. The court went on the ground that the duty imposed by the Reconstruction Act upon the President was not a mere ministerial duty but a political and executive one,[4] and after relying on the doctrine that courts will not enforce the performance by public

(4) Quoting from the decision: "Very different is the duty of the President in the exercise of the power to see that the laws are faithfully executed, and among these laws the acts named in the bill. By the first of these acts he is required to assign generals to command in the several military districts, and to detail sufficient military force to enable such officers to discharge their duties under the law. By the supplementary act, other duties are imposed on the several commanding generals, and these duties must necessarily be performed under the supervision of the President as Commander-in-Chief. The duty thus imposed on the President is in no just sense ministerial. *It is purely executive and political.*" (P. 499.) (Italics ours.)

officers of their political and executive duties, it held that in the same way it would not restrain a public officer from exercising a political and executive duty alleged to be unconstitutional. In the words of this Supreme Court:

> "It is true that in the instance before us the interposition of the court is not sought to enforce action by the Executive under constitutional legislation, but to restrain such action under legislation alleged to be unconstitutional. But we are unable to perceive that this circumstance takes the case out of the general principles which forbid judicial interference with the exercise of executive discretion." (p. 499).

But, moreover, this case must be distinguished from the case at bar, in that, in the instant case private rights are affected, while in that case no private rights were affected even after the President had enforced the Reconstruction Act which was alleged to be unconstitutional.

Furthermore, the language of this Court in that case, conveying the idea to the effect that the President of the United States will never be restrained in its action by the Judicial Department, can hardly be regarded anything but a *dictum*. "In any event," in the words of Justice Ostrand in his dissenting opinion, "if it is to be taken as authority for the proposition that the United States Supreme

Court may not prevent officers or members of Congress from carrying into effect an unconstitutional resolution, it is definitely overruled by the decision in the case of Kilbourn *vs.* Thompson (103 U. S., 168)" which we shall take notice further on. (T. of R., p. 79.)[5]

Very properly, it is also a well settled doctrine that questions as to whether a bill has been duly passed by a legislative body are of the exclusive ju-

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(5) Another illustration, is found in the case of Barcelon *vs.* Baker (5 Phil., 87) which is a petition for habeas corpus. Section 5 of the Act of Congress of July 1, 1902, conferred on the Governor-General the power to suspend the writ whenever the public safety might require it in cases of rebellion, insurrection, or invasion, and the case involved the question as to whether the courts may review the decision of the Governor-General in suspending the privilege of the writ. The court held that "whenever a statute gives discretionary power to a person to be exercised by him upon his own opinion on certain facts, such a statute constitutes him the sole and exclusive judge of the existence of those facts;" and that when the Governor-General, "with the approval of the Philippine Commission declares that a state of rebellion, insurrection, or invasion exists, the declaration or conclusion is conclusive against the judicial department of the government." The writ was therefore denied. But even where the Court properly held that it would not review the decision of the Governor-General on matters of its own jurisdiction, it inquired whether the action of

risdiction of the respective houses, and in all these cases mandamus against the presiding officer of the legislative house has been denied, on the well-taken ground that courts will not "interfere with either of the coordinate departments of the government *in the legitimate exercise of their jurisdiction and powers.*" (*Ex parte* Echols, 1886, 39 Ala., 698; State *vs.* Bolte, 1889, 151 Mo., 362. *See also* Turnbull *vs.* Giddings, 95 Mich., 314, where it was held that mandamus will not lie against the President of the Senate or against the Speaker and Secretary of the House to compel them to record in the Legislative journal a certain protest presented by a member which was rejected by both houses.)

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the Governor-General was beyond his powers, as it is evidenced by the following words of the Court:

> "(1) Admitting the fact that Congress had authority to confer upon the President or the Governor-General and the Philippine Commission authority to suspend the privilege of the writ of habeas corpus, was such authority actually conferred? and
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> "(2) Did the Governor-General and the Philippine Commission acting under such authority act in conformance with such authority? (5 Phil., 96.)

And only after having assumed jurisdiction of the case, it became convinced that the action of the Governor-General was within its own powers, was the writ denied.

The Constitution has also thought it proper to confine to the exclusive jurisdiction of each house of the Legislative Department to be "the Judge of the Elections, Returns and Qualifications of its own members" and to "determine the Rule of its Proceedings, punish its Members for disorderly Behaviour, and with the concurrence of two thirds, expel a member." * It has consequently been held that where a legislative body, with express or implied power to expel a member, exercises its power to expel a member, that the reasons for the expulsion, and the question whether a member was duly heard before being expelled, could not be inquired into by the courts, on the ground that "if the power exists, the house must necessarily be the sole judge of the exigency which may justify and require its exercise" (Hiss *vs.* Bartlett [1853] 69 Mass., 468), and expressed somewhat differently, this is so because the judicial department had no power "to revise even the most arbitrary and unfair action of the legislative department, or of either house thereof, taken in pursuance of the power committed exclusively to that

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(6) Art. I, Sec. 5 (1), (2), of the U. S. Constitution; Sec. 18, Organic Act of the Philippine Islands; with the only difference that in our Organic Act it appears the word "elective" between the words "expel a .... member."

department by the constitution," the power to expel conferred by the Constitution upon each House of the legislative body not being conditioned to a proper and a fair exercise of the power. (French *vs.* Senate [1905] 146 Cal., 604.)

Also, the power of punishment for disorderly behavior is not conditioned to a proper exercise of the power. The legislative house may punish a member for disorderly behaviour, and in the exercise of such a power, even though it be arbitrary, the legislative house will not be subjected to interference by the Courts. But if under the guise of punishment, the legislative house suspends a member, a power not included under its power to punish, the same would be something more than an abuse of discretion and good judgment in the exercise of the power to punish, but a real exercise of a power not conferred by the constitution upon the legislative house. We would then have a case of a department of the government overstepping the limits of its powers as set out in the constitution and which, as in this case, amounts to an encroachment into the powers of the Governor-General. And because the Constitution would be violated, the Judiciary would have a good ground of interfering in the matter.

The mere fact that an officer has not complied

with duties entrusted to him by an Act of the Legislature, is not of itself a sufficient ground to have the courts intervene in the matter, unless it appears that it was the *intention* of the legislature, as embodied in the Act creating and defining the particular public office, to have the judiciary exercise a certain reviewing power. If the legislature as such violates its own Act, it would be absurd to ask from the judiciary to control the legislature.[7] In the same way, the legislature may impose upon the Governor-General or any other public officer certain duties and powers and be its wish that in the exercise and non- exercise of such a duty the said public officer be absolutely beyond the control of the judiciary. In such a case, the judiciary would have no ground to

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(7) In the case of Abueva *vs.* Wood (22 Off. Gaz., P. I., 667) also relied by the decision of the Insular Supreme Court is found the following: "When the legislative department of the government imposes upon its officers the performance of certain duties which are not *prohibited by the organic law of the land*, the performance, the non-performance or the manner of the performance is under the direct control of the legislature, and such officers are not subject to the direction of the courts."

Mandamus in this case was sought to be directed against the Governor-General, Insular Auditor, and Officers of the Independence Commission which is a mere agency of the Legislature. The mandamus was asked to compel the respondents to exhibit to the pe-

intervene. This was exactly the underlying theory of the three cases more stressly relied upon by the majority of the Insular Supreme Court; namely, Severino *vs.* Governor-General (1910) 16 Phil. 366; Perfecto *vs.* Wood (No. 20867 of the Insular Supreme Court promulgated Jan. 25, 1924 not published) and Sutherland *vs.* Governor of Michigan (1874) 29 Mich., 320 which we will now proceed to discuss.

The first case related to an application for mandamus against the Governor-General to compel him to call a special election as provided by law. It can readily be noted that the duty of the Governor in that case was not imposed by the constitution. It was a mere political duty—imposed by an act of the Legislature—to call, in certain cases, for special elections of municipal officers. No constitutional duty

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titioners and to permit them to examine all the vouchers relating to expenses of the Independence Commission. Was there a constitutional or a statutory duty on these officers to permit the petitioners to examine all the vouchers relating to expenses of the Independence Commission? This question was readily answered in the negative, the Supreme Court saying on this point as to the Govenor-General:

> "Whether such inspection and examination should be granted, lies within the absolute discretion of the Governor-General." (Decision, p. 18.)

nor a corresponding constitutional right was violated. Hence, judicial control could not be had, under the inherent attribute of the judiciary to uphold the constitution, nor under the law imposing that duty upon the Governor-General. It is a mere question of statutory interpretation, whether under our system of government of three different independent branches, we should infer that the legislature intended that the judiciary should control and see to it that the head of the executive department fulfills his ministerial duties. And the Court in that case went on the simple ground that it was not the intention of the Legislature to have the judiciary control the Governor-General in the exercise of a simple statutory duty.

The Court said:

> "When the Philippine Legislative body confers upon the Governor powers and duties, it does so for the reason that he is in a better position to know the needs of the country than any other member of the executive department, and with the full confidence that he will perform such duties, under his official oath, as his best judgment dictates. If this had not been the intention of the Legislature, they could have placed the duty upon some other official of the executive department."

The case of Perfecto *vs.* Wood, also relied upon by the Insular Supreme Court as controlling on this

case (T. of R. pp. 38, 39) was also a mandamus case against the Governor to compel him to call for special elections.

Sutherland *vs.* Governor of Michigan, *supra*, related to an application for mandamus against the Governor to compel him to perform a duty imposed upon him by statute. The statute required the governor to issue a certificate of the completion of the construction of the Postage Lake and Lake Superior Ship Canal. The statute required the governor to issue the certificate when he should be satisfied *that the work had been done in conformity of the law.* The duty devolving upon the governor was therefore clearly discretional and this was recognized by the court, and though there is in the decision a line of reasoning planting the decision on additional and broader grounds, the underlying theory taken by the court was the simple ground that it was not the intention of the Legislature when it imposed the said duty upon the Governor to have him under the supervising powers of the Judiciary, as it is evidenced by the following:

> "It is not customary in our republican government to confer upon the governor duties merely ministerial, and in the performance of which he is to be left to no discretion whatever; and the presumption in all cases must be, where a duty is devolved upon

> the chief executive of the State rather than upon an inferior officer, that it is so because his superior judgment, discretion, and sense of responsibility were confided in for a more accurate, faithful, and discreet performance than could be relied upon if the duty were devolved upon an officer chosen for inferior duties. And if we concede that cases may be pointed out in which it is manifest that the governor is left to no discretion the present is certainly not among them, for here, by law, he is required to judge, on a personal inspection of the work, and must give his certificate on his own judgment, and not on that of any other person, officer or department."

It should not be presumed that the legislature has imposed upon the executive head of the Government a mere ministerial duty. But if in a given case, the duty imposed upon the Governor be clearly a ministerial one, and if it were also clear that the intention of the Legislature was to give the Judiciary a control over such particular case of open disregard of the mandates of the Legislature, courts have not hesitated to step into the matter and give a remedy. And it is on this ground that the courts of last resort in the states of Alabama, California, Colorado, Kansas, Maryland, Montana, Nebraska, Nevada, North Carolina, Ohio, and Wyoming have allowed writs of mandamus to the governors of their States for the performance of clear ministerial

duties. Also, because of such an open disregard of a mere ministerial duty imposed by statute, mandamus has been awarded against the very Speaker of the House of Representatives of a State, to compel him to certify to the comptroller of public accounts the amount to which the petitioner was entitled, as a member of said house for mileage or *per diem* compensation. *Ex Parte* Pickett, 24 Ala., 91.[8] And numerous cases can be cited where a writ of mandamus has been granted to impose action upon secretaries of the executive department, in cases of clear disregard of mere ministerial duties. Kendall *vs.* U. S. (12 Pet. 527) and Marbury *vs.* Madison (1 Cranch, 137) in which case in the words of the U. S. Supreme Court in the case of Mississippi *vs.* Johnson (4 Wall., 475) "it was held that the performance of this duty imposed by law on the Secre-

(8) Similar cases are: State vs. Elder (31 Neb., 169), where the writ was issued to compel the Speaker to open and publish returns of the general election. State vs. Moffitt (5 Ohio, 350), where mandamus was held to lie to the Speaker of the House to compel him to certify the election and appointment of officers. Wolfe vs. McCaull (76 Va., 87), where the writ was issued to compel the Keeper of the Rolls of the House of Delegates to print and publish a bill passed by the Legislature and upon request to furnish a copy thereof properly certified.

tary of State might be enforced by mandamus issuing from a court having jurisdiction."

It must also be noted that even where a court would hesitate to command the high officers of a co-ordinate department to comply with a duty imposed upon him by law, we have been unable to find a single case where a court has abstained to interfere where the duty involved was imposed by the Constitution. In the case of Barnard *vs.* Taggart, 66 N. H. 362; 25 L. R. A. 613, a writ of mandamus was issued to compel defendant, who was the President of the Senate, to assume the office of Governor of the State it being provided by the constitution of the State that the President of the Senate should assume the office of Governor "whenever the chair of the Governor shall become vacant by reason of his death, absence from the State, or otherwise" and after it was declared in that case that the illness of the Governor of the State which disabled him from performing the duties of his office constituted a vacancy during which the president of the Senate should exercise the power of the office of Governor of the State.

It is also very important to note that even where courts hesitate to command a public officer to comply with a duty imposed by law, it has never

hesitated to give a remedy even as against an act of the Governor-General and of a house of the legislature where the said acts are illegal, as contrary to the statute. An illustration of this attitude is the case of Borromeo *vs.* Mariano, 41 Phil., 343 where by the concurrent action of the Governor-General, pretending exercise of his appointing power, and the Senate, under the alleged exercise of its power to advise and give its consent to the appointments made by the Governor-General, transferred petitioner, a Judge of First Instance, against his will, from one judicial district to another. The Governor-General insisted on carrying out the transfer and the petitioner, against his will, was ousted from his position as judge of the twenty-first district, and respondent, the one newly appointed to succeed the petitioner, was given possession of the office. It was then that petitioner appealed for action to the Insular Supreme Court, which after a careful consideration of the case declared the new appointment and transfer carried out by the Governor-General with the advice and consent of the Senate, to be illegal, null and void, as being contrary to an act of the Legislature (sec. 155, Adminsitrative Code) and it was consequently declared that the petitioner had a right to the possession of the office, and that respondent be consequently ousted from said office and petitioner be

given possession of the same. Here we have a case where the Supreme Court passed upon the merits as to the legality of the action of both the Senate and the Governor-General. The Court found it to be contrary to an act of the Legislature, and the Supreme Court had no hesitation in declaring the same illegal and of giving the necessary remedies to vindicate the rights of the petitioner. It is true that neither the Governor-General nor the Senate were made a party in that action. But nevertheless, the reviewing power exercised by the Supreme Court in that case over the action of the Governor and the Senate is just as complete and thorough as the reviewing power sought in the instant proceedings. The real effect of the judgment in that case was to revoke the action of the Governor and the Senate.

If, as we have just seen, courts do not hesitate to give the proper remedy for acts of public officers that are merely illegal, it is not at all surprising to find the courts in every case, except in this instant proceeding, decidedly prompt to step in, where the acts of the officers of a co-ordinate department of the government are in excess of their authority under the Constitution.

The doctrine of non-interference by the judiciary with the other departments of the government,

rests on the ground that each department should be supreme and independent of each other *within the limits of its jurisdiction and powers.* It follows that the doctrine does not apply to cases where a department goes beyond its legitimate sphere (Bailey on Mandamus, p. 926) and as pointed out by Justice Ostrand in his dissenting opinion, this is, indeed, the first time any court has ever held that in such cases there may be no judicial interference. (T. of R., p. 76.)

In the instant proceeding it is admitted in the decision of the majority of the Insular Supreme Court that the Senate acted wholly outside the scope of its powers when it suspended the petitioner for one year. Moreover, it cannot be denied that by doing so, the Senate had encroached into the powers of the Governor-General, and disregarded the right of representation of a Senatorial District.

Having these as premises it is submitted that the controlling cases are Kilbourn *vs.* Thompson, 103 U. S., 168, and a numberless series of cases where it had been held "that all governmental officers, departments or agencies are subject to judicial restraint when they act *in excess* of their authority either statutory or constitutional, by virtue of which citizens are deprived of their rights" (Osborn *vs.* U.

S. Bank, 9 Wheaton (U. S.), 739; Board of Liquidation *vs.* McComb, 92 U. S., 531; United States *vs.* Lee, 106 U. S., 196; Virginia Cases, 114 U. S., 311; Regan *vs.* Farmers & Co., 154 U. S., 362; Smith *vs.* Ames, 169 U. S., 466, *Ex parte* Young, 209 U. S., 123; Philadelphia Co. *vs.* Stimson, 223 U. S., 605; Barcelon *vs.* Baker, 5 Phil., 141; Forbes *vs.* Chuoco Tiaco, 16 Phil. 534; *In re* McCulloch Dick, 38 Phil., 141; Concepcion *vs.* Paredes, 42 Phil., 599, and Borromeo *vs.* Mariano, 41 Phil., 343.)

Kilbourn *vs.* Thompson (103 U. S. 168) was an action for false imprisonment, brought against the Sergeant-at-arms of the House of Representatives, the Speaker, and members of a special committee when by a resolution of the House was instructed to make certain investigations. The petitioner in that case was called by the committee to testify, and on his refusal, he was condemned for contempt, arrested, and deprived of his liberty until he would accede to answer and produce certain papers. Petitioner here invoked the aid of the Court to declare illegal the action of the respondents. The due process clause was thus invoked and the Court acceded and declared that the investigation in that case was an inquiry into private affairs of the citizen, and so outside of the jurisdiction of the Court, and that the

House has no power to punish for contumacy a witness unless his testimony is required in a matter into which that House has jurisdiction to inquire. The court further held that "the House of Representatives is not the final judge of its own power and privileges in cases in which the rights and liberties of the subject are concerned, but the legality of its action may be examined and determined by this court."

In our Insular reports we also find a number of decisions for the doctrine that even the Governor-General is subject to the reviewing power of the courts where he has exceeded his own powers. To the case of Barcelon *vs.* Baker (5 Phil., 87) which we had already occasion to notice (footnote 5), we shall only take space to notice here three very important cases: Forbes *vs.* Chuoco Tiaco (16 Phil., 534); *In re* McCulloch Dick (38 Phil., 41), and Concepcion *vs.* Paredes (42 Phil., 599.)

Forbes *vs.* Chuoco Tiaco, *supra*, was a case brought by a deported chinese against the Governor-General for damages incurred because of the deportation which was alleged to have been illegal, the Governor having no power to deport. The majority of the Court held that the Governor had the power to deport. A concurring opinion went on the ground that even when the deportation was illegal, the Gov-

ernor-General was not liable for damages in that case, he being liable only "when he acts in a case so clearly outside of his power and authority that he cannot be said to have exercised jurisdiction and judgment, that is, the judicial faculty." As we see, if judgment was not given against the Governor, it was not because of his high position, but on the simple ground that he was not liable. The Court in reaching the conclusion that the deportation was valid had necessarily to review the power of the Governor-General in that case, and hence to that extent the Judiciary was exercising a reviewing power over the Governor. In such case the source of the control by the Judiciary was the due process clause of the constitution. If the deportation had been illegal to that much the petitioner had been deprived of his liberty without due process.

In the case of *In re* McCulloch Dick, *supra*, petitioner claimed to have been illegaly detained by the Governor-General who had decided to deport him from the Islands. The court instead of disposing of the case by a mere declaration of lack of jurisdiction, went on into the merits of the case, and to that extent exercised a reviewing power over the Governor-General. Again here the due process clause was invoked, and the Court had to take cognizance of the

case, not only reviewing the question of law as to the power of the Governor-General to deport aliens, but also the facts as to the point whether the petitioner was an alien or not.

Concepcion *vs.* Paredes, *supra*, was a petition for a writ of prohibition commanding the respondent Secretary of Justice to desist from carrying into effect the provisions of Act No. 2941 requiring the Judges of the Courts of First Instance to draw lots every five years for exchange of districts. The Court held that the act constituted an encroachment by the Legislature into the Governor-General's power of appointment and was, therefore, unconstitutional; and the Supreme Court did not hesitate to enjoin the Secretary of Justice to carry out the provisions of the void and unconstitutional act.

But it is contended in the opinion of the majority of the Insular Supreme Court

> "that looking through the form of the action to the substance, this is, in effect, a suit instituted by one member of the Philippine Senate against the Philippine Senate and certain of its official employees." (T. of R., p. 31.)

As Justice Ostrand points out in his dissenting opinion:

> "This might be true if the act complained of was an act within the jurisdiction of the Senate, but

such is not the case here. A practical illustration may, perhaps, make the point clear. Let us suppose that a majority of the members of the Senate should agree to commit a crime against another member and should pass a senatorial resolution to that effect. Would that, in anything but form, constitute a senatorial act? And suppose the same members should proceed to carry the resolution into effect, would not an action lie against such members and could that, in substance, be regarded as an action against the Senate? The questions answer themselves, and though in the present case the illegal act does not constitute a crime, the analogy is, nevertheless, obvious; the distinction is one without a difference." (T. of R., pp. 92, 93.)

A similar contention to that of the majority of the Insular Supreme Court has been time and again insisted in this Supreme Court. High public executive officers of the United States have tried to shield their actions from any interference of the courts with the doctrine excepting the United States from suit. In the words of this Court:

"If the conduct of the defendant constitutes an unwarrantable interference with property of the complainant, its resort to equity for protection is not to be defeated upon the ground that the suit is one against the United States. The exemption of the United States from suit does not protect its officers from personal liability to persons whose rights of property they have wrongfully invaded. Little v.

Barreme, 2 Cranch, 170, 2 L. ed. 243; United States v. Lee, 106 U. S. 196, 220, 221, 37 L. ed. 171, 181, 182, 1 Sup. Ct. Rep. 240; Belknap v. Schild, 161 U. S. 10, 18, 40 L. ed. 599, 601, 16 Sup. Ct. Rep. 443; Tindal v. Wesley, 167 U. S. 204, 42 L. ed. 137, 17 Sup. Ct. Rep. 770; Scanton v. Wheeler, 179 U. S. 141, 152, 45 L. ed. 126, 133, 21 Sup. Ct. Rep. 48. And in cases of an injury threatened by his illegal action, the officer cannot claim immunity from injunction process. The principle has frequently been applied with respect to state officers seeking to enforce unconstitutional enactments. Osborn v. Bank of United States, Wheat. 738, 243, 868, 6 L. ed. 204, 229, 235; Davis v. Gray, 16 Wall. 203, 21 L. ed., 447; Pennoyer v. McConnaughy, 140 U. S. 1, 10, 35 L. ed. 363, 365, 11 Sup. Ct. Rep. 699; Scott v. Donald, 165 U. S. 107, 112, 41 L. ed. 648, 653, 17 Sup. Ct. Rep. 262; Smith v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; Ex parte Young, 209 U. S. 123, 159, 160, 52 L. ed. 714, 728, 729, 13 L. R. A. (N. S.) 932, 28 Sup. Ct. Rep. 441, 14 A. & E. Ann. Cas. 764; Ludwig v. Western U. Teleg. Co., 216 U. S. 146, 54 L. ed. 423, 30 Sup. Ct. Rep. 280; Herndon v. Chicago, R. I. & P. R. Co., 218 U. S. 135, 155, 54 L. ed. 970, 976, 30 Sup. Ct. Rep. 633; Hopkins v. Clemson Agri. College, 221 U. S. 636, 643-645, 55 L. ed. 890, 894, 895, 35 L. R. A. (N. S.) 243, 31 Sup. Ct. Rep. 654. And it is equally applicable to a Federal officer acting in excess of his authority or under an authority not validly conferred. Noble v. Union River Logging R. Co. 147 U. S. 165, 171, 172, 37 L. ed. 123, 125, 126, 13 Sup. Ct. Rep. 271; American School v. McAnnulty, 187 U. S. 94, 47 L. ed. 90, 23 Sup. Ct. Rep. 33.

> "The complainant did not ask the court to interfere with the official discretion of the Secretary of War, but challenged his authority to do the things of which complaint was made. The suit rests upon the charge of abuse of power, and its merits must be determined accordingly; it is not a suit against the United States." (Philadelphia Co. v. Stimson, 223 U. S. 605.)

We have made an exhaustive review of all the cases cited in the majority opinion of the Insular Supreme Court, and it is submitted that none of them goes for the proposition that because the respondents are members or officers of another department the courts have no power to restrain or prohibit them from carrying into effect an unconstitutional and, therefore, void act of that department. In fact, the instant case is the first time that a court has abstained itself to uphold the constitution where private rights are involved and where one department of the government has exceeded its powers under the Constitution. Such a decision, we understand, far from upholding the theory of separation of powers disregards the same. Under it the Governor-General may assume legislative and judicial

functions, and his orders would not have the check of the Constitution which receives its life and restrictive force from the Judiciary; the legislature may exercise, without any restriction, executive and judicial functions, and exercise powers which the people has reserved for themselves and not delegated to any department of the Government, as the power to suspend Senators and Representatives; finally, by it, the Judiciary declines to comply with its all-fundamental function of upholding the Constitution, leaving the other two departments of the Government free to act beyond the limit set by the Constitution.

It is not asked that the Judiciary should encroach into the proper functions of the Executive and the Legislature. It is not asked that the Judiciary should assert a superiority for itself. It is only asked that the Constitution be upheld. It is only asked that by virtue of the very theory of Separation of Powers, every department should confine and commit itself to the exercise of its own functions and should not go beyond its own powers as by making illegal suspensions, and that every department should fulfill its own duties, and the Judiciary uphold the Constitution.

We close this brief, by inviting the attention of this Court to the very forceful and illuminating dissenting opinions of Justices Johnson and Ostrand.

Respectfully submitted,

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